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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 69.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR SOUTH MANCHESTER RAILROAD COMPANY, APPELLEE.

ROBERT E. QUIRK,
Solicitor for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT.

Proceedings in the Lower Court.

This is an appeal from the final decree of a three-judge statutory court sitting in the Northern District

of Illinois, Eastern Division, composed of Circuit Judge Evans and District Judges Carpenter and Woodward.

The lower court did not write an opinion in this case. Its action on the case is contained in fourteen findings of fact and four conclusions of law not officially reported but which appear at pages 1169 to 1173, inclusive, of the printed record. The appellants, plaintiffs below, petitioned the court for a permanent injunction restraining the enforcement of an order entered by the Interstate Commerce Commission July 15, 1931, in docket 17801, *Rules for Car Hire Settlement*, reported in 160 I. C. C. 369, and 165 I. C. C. 495 (R. 17-97) on the ground that the order of the Commission is invalid because not supported by sufficient evidence and because the order is arbitrary and will operate to confiscate the property of appellants without due process of law and without compensation.

The order entered by the Commission operates upon all common carriers by railroad within the United States and affects the cars owned and used by them in interchange service. There are in the United States 1731 steam railroads which operate 313,265 miles of track, and which own 2,625,886 freight cars, and there are 169 electric railroads which operate 11,940 miles of track and own 7,951 freight cars. Of this number 1347 steam railroads and 62 electric railroads are subscribers to the Per Diem agreement of the American Railway Association (R. 1066). This suit was brought by 12 Class I steam railroads the appellants here.

The final decree of the court below denied the re-

lief sought and dismissed the petition of appellants without prejudice to their right to appeal to the Interstate Commerce Commission for a modification of the order entered, when and if experience demonstrates that such order operates to the injury of petitioners.

Proceedings Before the Commission.

On January 4, 1926, the Commission entered an order instituting a nation-wide investigation into and concerning the rules for car hire settlement for the use and detention of freight cars, in effect between all common carriers by railroad in the United States, with the view to making such order or orders in the premises as may be warranted by the record.

By that order and by orders subsequently entered, the Commission reopened numerous cases which had been decided, as to disputes between carriers concerning car hire matters, and consolidated these with other pending cases which had not been decided with the general investigation. All of these cases, including the complaint of the South Manchester Railroad Company against the New York, New Haven and Hartford Railroad, docket 16420, were consolidated with the general investigation and were finally embraced and disposed of by the reports and order made by the Commission.

The record before the Commission consists of approximately 4800 pages of transcript and 540 exhibits. The evidence deals with practically every phase of the rules, regulations and charges affecting common carriers by railroad in the interchange of freight cars both as between the car owners and car users and as between car users.

Two reports were made by the Commission. The first report (R. 17) contained its findings of fact and conclusions. No order was entered in connection with that report. As certain of the respondents, the appellants here and others, refused to comply with the report and findings of the Commission, the Commission made a second report and entered an order on July 15, 1930 (R. 97) to give effect to the findings contained in its first report.

The American Railway Association is a voluntary association of railroads. Its membership includes practically all Class I railroads in the United States which represent about 98 per cent of the railroad mileage and 99 per cent of railroad-owned freight car equipment in the United States.

The issues before the Commission were shaped largely by the contest between the American Railway Association and the American Short Line Railroad Association as to what would constitute just and reasonable rules, regulations and charges in respect to the interchange of freight cars between trunk lines and short lines. Counsel for the American Railway Association aimed to demonstrate to the Commission that the rules made by that association are sufficient to meet the needs of all railroads in respect to car hire interchange; whereas counsel for the American Short Line Railroad Association undertook to show that the rules of the American Railway Association were not suited to the settlement of car hire interchange as between trunk lines and short lines. It will thus be seen that the Commission was confronted with the task of determining whether the rules, regulations and practices governing car hire matters es-

tablished by the trunk line membership in the American Railway Association were just and reasonable as applied to all common carriers by railroad. The dissatisfaction concerning these rules and charges on the part of short lines arises mainly from the fact that the short lines have had no voice in making the rules and that they have been made to suit the conditions of car interchange as between trunk lines and not as between trunk lines and short lines. In the main the rules prescribed by the Commission do not disturb the Per Diem Code of the American Railway Association in so far as it applies to the interchange of cars between trunk lines. The order of the Commission requires a change in the rules in respect to the interchange of cars between trunk lines and certain short lines, and the rules prescribed by it reflect the conditions surrounding the interchange between short line railroads and trunk line railroads in the matter of car hire settlement.

The record before the Commission showed that there is no uniformity in rules or charges governing the interchange of cars between trunk lines and their short line connections. In some instances the short lines were allowed to deduct from 1 to several days as free time before computing the car rental due to the trunk line connection or to the owner of the car. In other instances the short line settled directly with the car owner, while in still others it settled with its trunk line connection. Subscribers to the Per Diem Code of the American Railway Association were treated differently by members of that association from non-subscribers and non-members of that association. For example, while the basic principle of

the Per Diem Code is that every car owner shall be paid reasonable compensation by the user of the car for each day the car is held by the user, that principle was not applied as between a subscriber to the Per Diem Code and a non-subscriber. The trunk lines insisted on settling with the non-subscriber for the use of cars of the non-subscriber by the subscriber on a mileage basis rather than on the basis of the Per Diem Code of $1 per car day. What are called reclaim allowances were made to carriers in respect to cars interchanged at terminals in a switching service by subscribers to the Per Diem Code, but were not made in respect to cars interchanged by a subscriber and a non-subscriber in the same class of switching service.

The Commission found upon a comprehensive record that certain of the rules established by the trunk line railroads through the American Railway Association were and would be unreasonable and in lieu thereof it prescribed just and reasonable rules and regulations. (R. 92-93)

The findings of the Commission, which are made a part of the order entered are shown below for the convenience of the Court (R. 92-93):

> Upon this record we find that:
>
> 1. Common-carrier railroads, whether subscribers to the per diem agreement of the American Railway Association or non-subscribers, are entitled to receive reasonable compensation in the form of a daily rental for the use of their general-service freight cars when on foreign lines, and that the present per diem charge of $1 per car day reasonably compensates car owners for average car ownership and maintenance costs. The

reasonableness of this per diem rate is not questioned.

2. The per diem rules are unreasonable to the extent that they do not authorize payment of the same daily rental of $1 per car day to common-carrier nonsubscribers as to subscribers for the use of general-service freight cars.

3. Per diem rule 5 is unreasonable to extent that it prohibits car-hire allowances to nonsubscribers which perform terminal switching, as the latter term is defined by the switching-reclaim rules of the American Railway Association, and should be so amended as to provide for similar reclaim allowances to nonsubscribers as to subscriber lines.

4. Paragraph (b) of per diem rule 6, which pertains to car-hire settlements with nonsubscribers, is unreasonable and should be so amended as to direct subscribers to make settlements with nonsubscribers in conformity with our findings herein.

5. It is uneconomical and unreasonable to require short-line carriers which return railroad-owned equipment to the road from which received to report per diem accruals to numerous car owners throughout the country. Such lines should be attached to their connecting carriers for purpose of car-hire settlement.

6. For the future it will be reasonable for common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, cars which are received from another such carrier, to make car-hire settlements direct with car owners in accordance with the per diem rules, and for railroads 100 miles or more in length, regardless of the number of railroads with which they connect, to so report per diem to car owners.

7. For the future it will be reasonable for com-

mon-carrier railroads outside switching districts, other than those referred to in finding 6 to pay per diem to connecting carriers on railroad-owned cars after deducting an average of two days' free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, except that no car hire should be paid for cars received for return coal loading from coal mines.

8. The modified demurrage bases of settlement now in force with the Chicago Short Line, Illinois Northern, Manufacturers' Junction, Pullman, Bay Terminal, Benwood & Wheeling Connecting, Birmingham Southern, Genesee & Wyoming, Lake Erie & Fort Wayne, Lakeside & Marblehead, Lime Rock, McKeesport Connecting, Moshassuck Valley, Northampton & Bath, Tionesta Valley, Valley Railroad, and Valley & Siletz are unreasonable and should be abrogated, and that for the future it will be reasonable for connecting carriers to make car-hire settlements with these railroads in conformity with the general findings herein; provided, however, that the modified demurrage bases of settlement now in operation on such of these lines as perform switching service should be continued in force for a reasonable time, but not to exceed six months from the date hereof, to enable interested carriers to determine the amount of time actually required by each of such railroads to handle freight cars in terminal-switching service.

9. The existing basis of car-hire settlement with the Big Sandy & Kentucky River, Greenville & Northern, Jefferson & Northwestern, Kosciusko & Southeastern, Morehead & North Fork, Skaneateles, South Manchester, and Virginia Blue Ridge, is unreasonable, and that for the future it will be reasonable for connecting carriers to make car-hire settlements with these railroads in conformity with the general findings herein. Inasmuch as the bases of settlement here proposed

are for general application by all common carriers by railroad throughout the country, no retroactive adjustments will be required.

No order will be entered at this time, but carriers will be expected to modify their rules and practices to conform with our conclusions herein. If this is not done within a reasonable period, the matter may be brought to our attention for appropriate action.

A report of reclaims allowed to short-line railroads pursuant to findings herein and any changes subsequently made therein should be filed with us as soon as determined upon.

The Interest of Appellee, the South Manchester Railroad Company.

As the South Manchester Railroad Company, an appellee of record here, was a party to the proceeding before the Interstate Commerce Commission, it intervened in the court below as a defendant in support of the report and order of the Commission. (R. 126).

The South Manchester Railroad Company, hereinafter called the South Manchester, is a corporation of Connecticut. It operates approximately 2 miles of main line track from South Manchester, Conn., to Manchester, Conn., which is about 8 miles from Hartford, and 1.21 miles of side track. It is engaged in transporting both state and interstate commerce and has an interchange connection with the New York, New Haven and Hartford Railroad at Manchester. The South Manchester is a standard gauge railroad. At the time the record was made before the Commission 68 per cent of the freight tonnage handled by the South Manchester consisted of inbound shipments of coal. It unloaded 5 cars to each car loaded with

outbound tonnage. The car hire expense of the South Manchester under the per diem rules and regulations found unreasonable by the Commission in this proceeding (R. 93) are equivalent to one-fourth of its operating expense and one-seventh of its operating revenues. The situation of the South Manchester in relation to car hire settlement with trunk lines is similar to that of many other short line railroads. Under the rules condemned they were compelled to assume a car hire expense out of proportion to their earnings and participation in the line hauls.

The Question.

For many years prior to the institution of the investigation by the Commission into and concerning the rules for car hire settlement there had been much controversy between short line railroads and their trunk line connections as to the reasonableness and propriety of these rules and charges as applied to short lines. The investigation was instituted by the Commission upon its own motion but it was prompted to make the investigation by a petition filed with it by the American Short Line Railroad Association. The car hire rules generally in effect throughout the United States among trunk lines are the rules contained in the Per Diem Code established by the American Railway Association, a voluntary organization of railroads. Railroads such as the South Manchester, which have less than 100 miles of track, are not eligible to full membership in that association but are eligible to become associate members. An associate member has no voice in making or in modifying the car hire rules. Such a short line railroad may, however, subscribe to the Per Diem Code of the

American Railway Association. The South Manchester is not a subscriber to this code, but the trunk line members of the American Railway Association, subscribers to the Per Diem Code, have insisted that short line non-subscribers to that code settle car hire matters under the provisions of and at the per diem rate of the code. The basic principle of the Per Diem Code is that compensation, called per diem, should be paid by the user of a freight car to the railroad owning the car for the time the car is in the possession of the user. (R. 141) But this is not applied as to cars owned by a non-subscriber.

Since the war the rate of compensation for car hire has been and is $1 per car day. In finding No. 1 of its general findings (R. 92) the Commission concluded that common carrier railroads, whether subscribers to the per diem agreement of the American Railway Association or non-subscribers, are entitled to receive reasonable compensation for the use of their general service freight cars, when on foreign lines "and that the present per diem charge of $1 per car day reasonably compensates car owners for average car ownership and maintenance costs. The reasonableness of this per diem rate is not questioned."

As found by the Commission, the reasonableness of the per diem rate of $1 per car day as compensation from the user of the car to the car owner was not questioned in the proceeding before it. The question around which the controversy centered before the Commission was the reasonableness of the rules, regulations and car hire charge involved in the Per Diem Code as between car users under the varying circumstances and conditions under which the cars are used. We concede that generally as be-

tween the car owner and the car user the per diem charge of $1 is reasonable compensation as found by the Commission for *average* car ownership under average conditions. But, as an examination of the findings of the Commission (R. 92) and its order entered July 15, 1930 (R. 99) will show, it prescribed a set of rules and regulations to govern various classes of common carriers by railroad subject to its jurisdiction, not only as between the car user and the car owner but as between car users under the varying circumstances and conditions in which these classes of common carriers interchanged and use cars.

Omitting the first three paragraphs, which merely recite the character of the proceeding, the pertinent part of the Commission's order of July 15, 1930, which is here under attack (R. 99) provides:

> "*It is further ordered,* That the said respondents herein be, and they are hereby, notified and required to establish, on or before October 1, 1930, and thereafter to maintain and observe, rules with respect to car-hire settlements which shall provide:
>
> (1) That the same daily car rental shall be paid to common-carrier nonsubscribers as respondents contemporaneously pay to subscribers to the per diem rules agreement of the American Railway Association, for the use of general-service freight cars.
>
> (2) That similar reclaim allowances shall be made to nonsubscribers as to subscribers of the per diem rules agreement, in connection with cars handled in terminal switching service, as the latter term is defined by the switching reclaim rules of the American Railway Association.
>
> (3) That short-line railroads which are less than 100 miles in length, and which return rail-

road-owned equipment to the road from which received, shall not be required to report per diem accruals to numerous cars owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement.

(4) That common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, shall make car-hire settlements direct with car owners in accordance with the per diem rules.

(5) That common-carrier railroads outside switching districts, other than those referred to in paragraph 4 hereof, shall pay per diem to connecting carriers on railroad-owned freight cars after deducting an average of two days free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, except that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply.

It is further ordered, That this order shall continue in effect until the further order of the Commission.

And it is further ordered, That all unexpired orders, or parts of unexpired orders, heretofore entered in the proceedings consolidated with and made a part of this proceeding, be, and they are hereby, vacated and set aside in so far as in conflict with our order herein."

The order of the Commission speaks for itself. Briefly stated, it requires (a) that non-subscribers and subscribers to the Per Diem Code of the American Railway Association shall be treated alike, (b)

that reclaim allowances in respect to cars interchanged in terminal switching services shall be made similarly to non-subscribers and to subscribers to the Per Diem Code, (c) that short line railroads which are less than 100 miles in length and which return railroad-owned cars to the road from which received shall not be required to report per diem accruals to the numerous car owners throughout the country but shall report to their immediate connections, (d) that railroads which interchange freight cars with more than one subscriber railroad and which deliver to one or more subscriber railroad freight cars which are received from another such railroad, and railroads of 100 miles or more in length shall make car-hire settlements directly with the car owners in accordance with the Per Diem Code, (e) that railroads outside of switching districts other than those referred to in paragraph 4 of the order shall pay per diem to connecting railroads on railroad-owned freight cars after deducting an average of two days free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, and (f) that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply.

The appellants contended in the court below and contend here that the order of the Commission is invalid and should be set aside because they say the evidence is insufficient to sustain the requirements of the order, that it is arbitrary, that the order will operate to confiscate the property of appellants and other carriers similarly situated and will deprive them of their property without due process of law

and without compensation in violation of the provisions of the Fifth Amendment of the Constitution of the United States.

The court below, in its findings of fact and conclusions of law, (R. 1169-1173) found that the Commission had jurisdiction to institute the proceeding and to make the order attacked, that each finding of the Commission is supported by evidence, that the evidence justified the classification for purposes of determining car rentals and car hire settlements of railroads into two classes (a) railroads whose mileage exceeds 100 and (b) railroads whose mileage is less than 100 miles, and that the evidence supports the finding of the Commission for relieving railroads of car rental on cars placed at coal mines for coal loading by carriers which are customarily dependent upon connecting carriers for car supply, that there is a fact basis for the exceptions in paragraph 5 of the Commission's order, that the finding of the Commission that the same car rental be applied to non-subscribers as to subscribers of the American Railway Association is not unreasonable or discriminatory, and that the provisions exempting certain railroads which are less than 100 miles in length from the requirement to report per diem accruals to car owners throughout the country is not unreasonable or discriminatory.

The question before this Court is whether or not there is any reversible error in the findings of fact and the conclusions of law made by the court below.

STATUTES INVOLVED.

Paragraph 10 of section 1 of the Interstate Commerce Act (40 Stat. L. 101 and 41 Stat. L. 476; U. S. Code Title 49, sec. 1) provides:

(10) "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

Paragraph 11 of section 1 of the Interstate Commerce Act (41 Stat. L. 476; U. S. Code Title 49, sec. 1) provides:

(11) "It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Paragraph 12 of section 1 of the Interstate Commerce Act (41 Stat. L. 476; U. S. Code Title 49, sec. 1) provides:

(12) "It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not

so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

Paragraph 14 of section 1 of the Interstate Commerce Act (41 Stat. L. 476; U. S. Code Title 49, sec. 1) provides:

> (14) "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices."

APPELLANTS' SPECIFICATION OF ERRORS.

Appellants make the following specification of errors:

> 1. The lower court erred in failing to hold that Paragraphs (2), (3) and (5) of the Commission's said order, which require appellants to pay the car accounting and car hire expenses of other common-carrier railroads and permit the use of freight cars owned by appellants by such other common carriers, all without the payment of any compensation or adequate compensation to appellants, were void and beyond the power and jurisdiction of the Commission, and in failing to hold that said paragraphs of the order operate to confiscate the property of appellants and de-

prive them of their property without due process of law and without compensation, in violation of their rights under the Fifth Amendment to the Constitution of the United States.

2. The lower court erred in failing to hold that the evidence in the record of the proceedings before the Commission was insufficient to support the requirements of Paragraphs (2), (3) and (5) of said order and in holding that such evidence fully supported each finding of the Commission.

3. The lower court erred in failing to hold that the evidence in the record of the proceedings before the Commission was insufficient to afford a fact basis for the requirements of Paragraphs (2), (3) and (5) of said order.

4. The lower court erred in holding that the statement of the evidence introduced in the proceedings before the Commission, as contained in the Commission's report dated January 7, 1929, fully covers the controverted issues.

5. The lower court erred in failing to hold that the classification of railroads created by the said order of the Commission was arbitrary, unreasonable and illogical and was not supported by any evidence in the record of the proceedings before said Commission.

6. The lower court erred in failing to hold Paragraphs (2), (3) and (5) of the said order void for the reason that, as shown by the evidence in the record of the proceedings before the Commission and the reports of the Commission, the requirements of said paragraphs of the order were based upon insufficient and improper evidence pertaining to an issue not involved in the proceedings before the Commission.

7. The lower court erred in failing to hold that the Commission's order in void as being arbitrary, unreasonable and illogical and unsupported by and contrary to the findings and the evidence in the case.

SUMMARY OF ARGUMENT.

1. Paragraph 14 of section 1 of the Interstate Commerce Act confers upon the Commission the power, after hearing, with or without complaint, to establish reasonable rules, regulations and practices with respect to car service, including the compensation to be paid for the use of the cars not owned by the carrier using them and the penalties or other sanctions for non-observance of such rules, regulations or practices. It is, therefore, clear that the Commission had the power to make the order attacked provided it was based upon substantial evidence. As was stated in *I. C. C. v. Ill. C. R. Co.*, 215 U. S. 452, the power to make the order and not the mere expediency or wisdom of having made it is the question. As the order of the Commission is supported by evidence it is conclusive upon the courts. *Western Paper Makers Chemical Co. v. U. S.*, 271 U. S. 268; *Skinner & Eddy Corporation v. U. S.*, 249 U. S. 557; *New England Divisions case*, 261 U. S. 184; *Virginian Rwy. Co. v. U. S.*, 272 U. S. 658; *Assigned Car cases*, 274 U. S. 564.

2. Under its power to establish reasonable rules, regulations and practices in respect to car service and to determine the compensation to be paid for the use of cars, the Commission may prescribe different rules for different classes of common carriers. It is not error for the Commission to prescribe different rules and regulations and a different basis for compensation applicable to certain classes of railroads under 100 miles in length. *Railway Mail Pay case*, 165 I. C. C. 774; *Railway Mail Pay case*, 144 I. C. C. 675; *Railway Mail Pay case*, 56 I. C. C. 1; *St. L. I. M. & S.*

R. Co. v. Arkansas, 246 U. S. 518; *C. R. I. & P. Co. v. Arkansas*, 219 U. S. 453; *Wilson v. New*, 243 U. S. 332.

3. There is no merit in the appellants' contention that the order of the Commission is void upon the ground that it operates to confiscate the property of appellants and to deprive them of their property without due process of law and without compensation. The Commission has complete jurisdiction over the subject matter. The appellants are common carriers whose property is devoted to public use. Therefore they must yield obedience to the order if, as we contend, it was made in the legitimate exercise of the power of the Commission and of Congress. *Munn v. Illinois*, 94 U. S. 113; *C. B. & Q. v. Cutts*, 94 U. S. 155; *A. C. L. R. Co. v. N. C. Corp. Com.*, 206 U. S. 1; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *United States v. Berwind White Coal Mining Company* (the Assigned Car cases) 274 U. S. 564. The Fifth Amendment refers to direct appropriation and not to injury incident to the exercise of a lawful power in the public interest. *Legal Tender cases*, 12 Wall. 550; *United States v. Lynah*, 188 U. S. 445; *C. B. & Q. R. R. Co. v. Illinois*, 200 U. S. 561.

4. There is no merit in the appellants' specification of error that the court below failed to find that the evidence in the record before the Commission was insufficient to support the requirements of paragraphs 2, 3, and 5 of the order of the Commission. The evidence before the Commission dealt with practically every phase of the relation between the various classes of railroads in the interchange of freight cars and shows that under the rules and practices condemned by the Commission non-subscribers to the

Per Diem Code of the American Railway Association were treated differently from subscribers in the matter of car rental and in the matter of reclaim allowances, that short line railroads under 100 miles in length perform a terminal and assembling service, and are not equipped generally to report car hire accruals to the numerous car owners throughout the country and that certain short line railroads outside of switching districts which perform a terminal and assembling service have been required to assume a share of the car rental charges based on the Per Diem Code out of proportion to the character of service performed by them and to the revenues received. The evidence also shows that no demurrage charges are collected under the National Code of Demurrage Rules on coal cars placed at coal mines for the loading of coal, and that in these circumstances to require short lines to pay the per diem rental of $1 for every day of detention would impose upon such a railroad a burden of car hire expense entirely out of proportion to the length of haul, the revenue received by it, and the kind of service performed.

ARGUMENT.

1. The Commission Has the Power Under Section 1 (10-14) to Establish Reasonable Rules, Regulations and Compensation in Respect to the Distribution and Interchange of Freight Cars Among Railroads Subject to the Interstate Commerce Act.

That Congress has the authority to control the instrumentalities employed in interstate commerce is not open to question. *I. C. C. v. Illinois C. R. Co.,*

215 U. S. 452. Appellants concede the jurisdiction of the Commission over the subject matter. That Congress has delegated to the Commission the exclusive power to regulate the distribution and interchange of freight cars is settled. *United States v. New River Co.*, 265 U. S. 533; *Assigned Car cases*, 274 U. S. 564.

This Court will not weigh the evidence introduced before the Commission nor will it inquire into the soundness of the reasoning by which its conclusions are reached or question the wisdom of the regulations which it prescribes. *Western Paper Makers Chemical Co. v. U. S.*, 271 U. S. 268, 271; *I. C. C. v. Illinois C. R. Co.*, 215 U. S. 452, 471; *U S. v. New River Co.*, 265 U. S. 533. Such matters are left by Congress to the administrative tribunal "appointed by law and informed by experience". *Ill. C. R. Co. v. I. C. C.*, 206 U. S. 441, 454.

Paragraph 10 of section 1 of the Interstate Commerce Act defines the term "car service" to include "the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property".

Paragraph 11 of section 1 imposes upon every railroad subject to the Act the duty to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

Paragraph 12 provides that it shall also "be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line of lines or customarily dependent upon it for car supply".

Under paragraph 13 the Commission may require the carriers to file their rules and regulations with respect to car service in tariffs.

Paragraph 14 of section 1 confers upon the Commission the power, after hearing with or without complaint, to "establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices."

An examination of these paragraphs of section 1 shows that the purpose of imposing these duties on the railroads and of conferring the powers upon the Commission was to bring about the establishment of just and reasonable rules, regulations and charges in respect to the interchange of cars among railroads subject to the act so that commerce would move unhampered.

The test of the validity of a regulation established by an order of the Commission under the power granted is that it be reasonable, appropriate and not inconsistent with the law. *U. S. v. Morehead*, 243 U. S. 607.

The authority of the Commission exercised in pursuance of this grant of power will not be narrowly construed, nor will the exercise of such powers be held to be void merely because it may seem unwise. *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 410.

The order of the Commission here under attack has for its purpose the establishment of just, reasonable and equitable rules and reasonable compensation to govern the interchange of cars between various

classes of railroads, under the varying conditions shown by the evidence.

The Per Diem Code of the American Railway Association provided that subscribers should be paid $1 per day rental for cars owned by them while used by both subscribers and non-subscriber railroads, but did not provide for the same payment to a non-subscriber for the use of its cars by a subscriber.

Paragraph 1 of the Commission's order requires that the same daily car rental shall be paid to non-subscriber railroads as is paid to subscribers under the Per Diem Code of the American Railway Association. (R. 99)

Paragraph 2 of the Commission's order requires that similar reclaim allowances shall be made to non-subscribers as to subscribers of the per diem rules agreement in connection with cars handled in terminal switching service. Under the rules condemned by the Commission a reclaim allowance was made to subscriber railroads which perform a terminal switching service but was not made to a non-subscriber railroad which performed the same character of service. The Commission's order requires equality of treatment in respect to reclaim allowances. The reclaim allowance is based upon the principle that a terminal switching carrier should be relieved of the per diem expense incurred while the car is in its possession (a) because it does not receive sufficient revenues to warrant the assumption of such an expense, and (b) because of the unavoidable delays incident to the character of service performed.

As to paragraph 2 appellants say that it gives the non-subscriber the right to terminal switching reclaim but that it does not require them to allow such

a reclaim to a subscriber. When the order of the Commission is examined in the light of the character of the proceeding, the basis of this contention entirely disappears, because the order operates directly on every railroad made respondent to the proceeding, which includes subscribers to the Per Diem agreement as well as non-subscribers. As non-subscribers are respondents, it is plain that the order requires them to make reclaim allowances to subscriber railroads.

The difference in the volume of traffic handled by a trunk line as compared with a short line might impair in some instances the reciprocal opportunities in respect to per diem reclaim, but that fact does not affect the validity of the order. Appellants contend that there is no provision in the law which requires them or any railroad to allow reclaims in per diem and that they are allowed by appellants and other subscribers to the per diem rules agreement by virtue of the terms of the agreement. This is but saying that the powers conferred upon the Commission by paragraph 14 of section 1 of the Act are not sufficient to enable it to prescribe just and reasonable regulations to govern the compensation and the interchange of cars among railroads subject to the Act. As to this we think it sufficient merely to refer to the fact that in the *New River case*, 265 U. S. 533, the Court held that the interstate commerce Act confers power on the Commission to regulate the distribution and interchange of cars and that its jurisdiction over the subject is exclusive.

The record shows that there has been an absence of uniformity in the rules and regulations governing car hire between trunk lines and short lines. In

some instances some trunk lines allowed certain short lines from one to four or five days, generally two days, free time before the short line was obliged to compute car rental at the current per diem rate. In most instances the trunk line connection of the short line required the short line to pay the per diem rate for each day that a car owned by the trunk line or other carrier was held by the short line.

The regulation established by paragraph 5 of the order applicable to short lines other than terminal switching lines is based upon the principle that as between certain car users a reasonable number of free days should be deducted by certain classes of short lines to take care of average detention before such lines compute car rental on the per diem basis. This does not mean that the short line is thereby relieved of paying a fair proportion of the car hire expense or that the owner of the car is deprived of reasonable compensation. It means simply that the Commission gave recognition to the fact that this class of short line performs an assembling and terminal service; that unavoidable delays are an incident of that service; and that the short line must allow two days free time to the shipper to load and to the consignee to unload a car under the demurrage code. The principle of this regulation has been applied by the appellants themselves and by other trunk line railroads in the so-called reclaim allowances to subscribers to the Per Diem Code which perform a terminal switching service. There is no substantial difference in the service performed by a stub end short line, contemplated by paragraph 5 of the order, and the service performed by a terminal switching carrier because each must put the cars in

fit condition for loading and must assemble and place them for loading or unloading as the case may be.

2. Under Its Power to Establish Reasonable Rules, Regulations and Charges in Respect to Car Service, the Commission May Establish Different Rules and Charges Applicable to Certain Classes of Railroads Based on Different Circumstances and Conditions.

The effect of the order of the Commission is to place common carrier railroads into three classes for the purpose of car hire settlements. One class is composed of railroads 100 miles or more in length. This class is required to make car hire settlements directly with car owners in accordance with the requirements of the Per Diem Code of the American Railway Association. The second class is composed of railroads less than 100 miles in length which interchange freight cars with one or more railroads subscribers to the Per Diem Code. This class of railroads usually handle what is called intermediate or overhead carload freight, that is, freight received from one carrier and delivered in the same car to another connecting carrier. This class is required to make car hire settlements directly with the car owner in accordance with the rules of the Per Diem Code. The third class are railroads less than 100 miles in length which have one or more interchange connections with other railroads and whose interchange business consists mainly (a) of the receipt of an empty car from a connecting line to be returned to the same line loaded, and (b) to the receipt of a loaded car from a connecting line to be unloaded

and returned empty or loaded to the same carrier. This is regarded as a terminal service incident to the interchange of the traffic. The order provides that railroads in this class shall make car hire settlements directly with the carriers with which they interchange the freight, and that in doing so they may deduct an average of two days free time per loaded car interchanged. If this class of carrier receives cars for return loading with coal from coal mines served by it which are customarily dependent upon the connecting lines for car supply, it shall not be required to pay car hire on such cars.

Section 1 (12) of the interstate commerce act provides that it shall be the duty of every carrier by railroad to make "just and reasonable distribution of cars for the transportation of coal among the coal mines served by it, whether located on its line or lines or customarily dependent upon it for car supply * * *." This paragraph was considered by the Court in *United States v. New River Co.*, 265 U. S. 533, and in the *Assigned Car cases*, 274 U. S. 564. The placement of cars at coal mines is governed by car distribution rules and not by the demurrage rules which apply to carload freight other than coal. The mine ratings and coal car distribution rules generally in effect have been tentatively approved by the Commission in *Rules Governing Ratings of Coal Mines*, 95 I. C. C. 309. These rules permit mines, during periods when there is a surplus of coal cars to hold the cars on mine tracks indefinitely without being required to pay demurrage or other penalties.

Trunk lines, the appellants, among others, aided in formulating the coal car distribution rules now in effect and in obtaining the approval thereof by the

Commission. In *Demurrage on Coal and Coke,* 102 I. C. C. 554, the Commission found that since car distribution rules are in effect at coal mines, the railroad may not assess demurrage for any part of the detention against the coal mines. Under Rule 6 of the Per Diem Code short lines would be required to pay $1 per day to the owner of the car or to the connecting carrier for each day the coal cars are held at coal mines though prohibited from collecting demurrage from the mines for such detention. In some instances a short line has stored coal cars for its trunk line connection. (R. 255) This imposed on the short line an unreasonable car hire expense.

Paragraph 3 of the Commission's order requires that a short line railroad less than 100 miles in length which returns railroad owned equipment to the road from which received shall not be required to report car hire accruals to the numerous car owners throughout the country, but shall be attached to its connecting carrier for purposes of car hire settlement. The record shows that trunk lines such as the appellants are equipped with car accounting departments which are able to account for car hire settlements for the interchange of cars between themselves and short line carriers contemplated by paragraph 3 of the order, with little or no additional expense, and that very little car accounting is required of a short line when it makes settlement directly with its connection. On the other hand the record shows that to require a short line, contemplated by paragraph 3 of the order, to make car hire settlements directly with the numerous car owners throughout the country, unnecessarily and unduly increases the expense of performing that work. The total annual expense for this work by short lines would be about

$500,000.00 (R. 825). The Commission's order covering this subject is based upon the facts of record and the principle that as the trunk line is equipped to do this work with practically no additional expense, it is reasonable and in the public interest as well as in the interest of the railroads themselves that short lines of this class be relieved of the expense.

Briefly summarized, the order of the Commission requires trunk lines to adopt uniform practices in making car hire settlements with short terminal railroads of the class described in paragraph 3 thereof. It requires trunk lines to discontinue the practice in effect for many years whereby they, contrary to their own rules, made exceptions thereo as to some short lines and refused to do so as to others. Paragraph 5 of the order, which must be read in connection with paragraph 3, provides that the class of railroads contemplated by paragraph 3 shall pay car hire to connecting railroads on railroad-owned freight cars after deducting an average of 2 days free time per loaded freight car interchanged and that settlements should be made at the end of each calendar month. The service performed by this class of carriers consists generally of receiving an empty car from a connecting line and returning that car with a load or of receiving a loaded car from a connecting line and returning the car to that line loaded or empty. This class of carrier performs a service substantially the same as the service performed by terminal switching railroads within switching districts. Under the reclaim allowances of the Per Diem Code, a switching carrier is allowed to reclaim on the average about $5 per car of the car hire paid, and is allowed to retain all the demurrage charges collected by it. Such

switching carriers and the short lines contemplated by paragraphs 3 and 5 of the order each interchange freight cars with a connecting carrier, and each must allow the shipper two days free time to load a car and two days free time to unload under the demurrage code. It is the duty of carriers in this class to see to it that cars placed for outbound shipments are in fit condition to carry the lading and that the cars are properly loaded.

The South Manchester may be used to illustrate short line carriers in this class. The South Manchester has two miles of main line track between South Manchester and Manchester, Conn. It has an interchange connection with the New York, New Haven and Hartford at Manchester. The average detention of cars on its line at the time of the hearing was about 2.15 days. (R. 970) Under the rule prescribed by the Commission, the South Manchester will be allowed to deduct an average of two days free time per loaded freight car interchanged before making car hire settlements with the New Haven on a per diem basis. Under the rules condemned by the Commission, the South Manchester would be obliged to pay $1 per car for each day a car is on its rails, even though most of the detention or all of it occurred as an incident to the placement of the car at the plant of the shipper for loading or unloading. If the New Haven placed a car at the plant of a shipper on its own rails at Manchester, it would be obliged to allow two days free time for loading or for unloading as the case may be. But under the rules condemned by the Commission, if the New Haven switched the car to the South Manchester for a load, the South Manchester would be obliged to pay the New Haven or the car owner $1 for each day

the car was detained for loading or unloading. The rules prescribed by the Commission simply recognize the principle that as between the various users of cars it is unreasonable to require a terminal short line to pay car hire on the straight per diem basis. The per diem method of adjusting car hire settlements is but a convenient way of computing compensation. It does not follow that a car owner is deprived of reasonable compensation for average car ownership because as between the various users of the car the Commission requires that a certain class of carrier on account of the service performed and other circumstances, an average of two days should be deducted before that carrier is obliged to compute the car hire rental due from it at the per diem rate.

The principal question which the Commission had to determine was what would constitute reasonable compensation from the various railroads using a car in transporting interline freight. The investment in freight cars in use in this country varies substantially according to the size and character of the car. The circumstance of certain of the railroads which would participate in the transportation of say, a shipment from Seattle to a point on a small railroad in Pennsylvania would relieve them of all car hire expense under the Per Diem Code. Where, for instance, a carrier receives a car from a connection after midnight and delivers the car the same day to a connection before midnight, it is not required to pay per diem on that car during that period. The Elgin, Joliet & Eastern, which serves as a connecting link between eastern and western railroads handles a great volume of carload business in this manner as

does the Richmond, Fredericksburg & Potomas Railroad. The short line railroads embraced within paragraphs 3 and 5 of the Commission's order do not perform an intermediate service and are not in position by virtue of that fact to escape or minimize the car hire expense as are intermediate carriers. These and other considerations caused the Commission to prescribe a rule that gives recognition to a principle already ingrained in the per diem code, which is that while the car owner is entitled to reasonable compensation for its car from the railroad which uses it, the car owner is not deprived of reasonable compensation because it may not receive compensation at the per diem rate from every carrier on every car for every day the car is out of its possession.

Appellants enthusiasm for the virtue of per diem as a method of computing compensation has caused them to lose sight of the more fundamental question considered by the Commission, namely that the car owner is only entitled to reasonable compensation for the use of its cars by other carriers and that it obtains reasonable compensation under the regulation prescribed by the Commission even though at the end of the year it may turn out that the car owner did not receive compensation equivalent to $1 per day for each day that each car was used by other carriers. As heretofore stated, the per diem rate of $1 was approved by the Commission as representing reasonable compensation for average car ownership. A particular carrier cannot complain because as to its cars it may not receive during a given period compensation at $1 for each car for each day the car is off its line.

Appellants contend that the classification of rail-

roads made by the Commission is arbitrary and unreasonable and is not supported by any evidence in the record. This contention is unfounded. The classification of the Commission is not unreasonable or arbitrary because it makes a distinction between railroads less than 100 miles in length and railroads more than 100 miles in length. The Commission and this Court have frequently approved such a distinction. In the *Railway Mail Pay cases*, 56 I. C. C. 1; 144 I. C. C. 675; and 165 I. C. C. 774, the Commission fixed different compensation for separately operated railroads not exceeding 100 miles in length and not less than 50 miles in length from the compensation fixed for railroads exceeding 100 miles in length and for railroads less than 50 miles in length.

In *St. L. I. M. & S. Rwy. Co. v. Arkansas*, 240 U. S. 518, the Court dealt with a statute which forbade railroads from conducting switching operations across public streets in first and second class cities, with a crew of less than 1 engineer, 1 foreman, 1 fireman and 3 helpers, with an exemption in favor of railroads less than 100 miles in length. It was there contended that this exemption was unreasonable, unlawful and arbitrary. In answering that contention the Court cited *C. R. I. & P. v. Arkansas*, 219 U. S. 453, where a statute exempting railroads less than 50 miles in length was before it, and said:

> "The distinction seems arbitrary if we regard only its letter but there may have been considerations which determined it and the record does not show the contrary. 'We have recognized the impossibility of legislation being all comprehensive and that there may be particular groupings of objects which will as a whole fairly present a

> class of itself although there may be exceptions in which the evil aimed at is deemed not so flagrant. *Armour & Co. v. N. Dakota,* 240 U. S. 510; *Miller v. Wilson,* 236 U. S. 373."

See also *N. Y. N. H. & H. R. Co. v. New York,* 165 U. S. 628, and *Chesa. & Ohio Ry. Co. v. Conley,* 230 U. S. 513, 523.

In *Wilson v. New,* 243 U. S. 332, the Supreme Court sustained the Adamson Act. That Act exempted from its provisions certain carriers not exceeding 100 miles in length, as well as electric street and interurban railroads. In answer to the contention that this exemption was unreasonable and arbitrary, the Court said, at page 354:

> "The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions."

These and other decisions support the view that the classification made by the Commission in this proceeding is not without precedent. Appellants contend that these decisions are not applicable because here there is no question of public safety nor of public interest. The right of the Commission to classify, in the exercise of its power to prescribe just and reasonable rules and regulations to govern the distribution of cars and to fix compensation does not depend on the question whether the public safety or direct public interest is involved. Such a classification is but an incident to the exercise of the power granted. While at first blush the lan-

guage chosen by the Commission giving effect to paragraphs 3 and 5 of its order may appear involved and arbitrary, it will be found upon analysis that these paragraphs actually set up rules and regulations to govern the interchange of cars with the compensation to be paid, by a class of short line railroads which perform an assembling and terminal service and which, on that account, must in fairness be treated differently in car hire settlements from trunk lines or carriers performing intermediate and other services.

Car hire settlements between trunk lines under the Per Diem Code of rules are based in part upon the principle of reciprocity, and settlements between such railroads are made on balances. Some roads at the end of the settling period will have credit balances, while others will have debit balances. A trunk line may lose in car hire accruals at one point, and gain in car hire credits at another point. The record shows that if 429 short lines, members of the American Short Line Railroad Association, should own the same proportion of freight cars per mile of road as are owned by trunk lines, they would own 11 cars per mile of road, which would make it necessary for them to purchase 114,000 additional freight cars, and that if other short lines who are not members of the short line association should do likewise, it would require the purchase of 150,000 additional freight cars. At the per diem rate of $1, this would add $55,000,000 to the cost of car ownership per year on which the public would have to pay a fair return. (R. 810)

As there has been a great surplus of cars in recent years, due to the increased speed in handling and

the increase in the average load per car, it is of course obvious that it would be contrary to the interest of the railroads themselves and to the public for short line railroads to acquire additional equipment. There are more than enough cars in the country today to handle the commerce. These facts were considered by the Commission. If these short lines should acquire 150,000 additional cars, the interchange of these cars with the trunk lines might enable them to adjust car hire settlements on the same reciprocal basis as car hire settlements are now adjusted between trunk lines. But an acquisition of additional equipment under the facts shown of record for the sole purpose of enabling carriers of a certain class to accrue larger per diem credits would be without any justification from the standpoint of the public interest and the best interest of the railroads.

3. There Is No Merit in Appellants' Contention that the Order of the Commission is Void Upon the Ground that it Takes Their Property Without Due Process of Law.

A large part of appellants' brief is devoted to the task of attempting to support the contention that the order of the Commission is void upon the ground that it operates to confiscate their property and to deprive them of the property without compensation and without due process of law. A similar contention was made by certain parties in the *Assigned Car cases,* 274 U. S. 564, which was briefly disposed of by the Court as having no merit. The contention here is equally lacking in merit. Where private property is devoted to public use, it is fairly well settled that

it must yield obedience to an order made by a tribunal such as the Commission in the legitimate exercise of its power. There can be no question here that the Commission has the power to make rules and to fix the compensation to govern the interchange of cars. The only question entitled to any consideration is whether the order entered in this case is an abuse of the power conferred upon the Commission. The fact that appellants may suffer some injury incident to the exercise of the power of the Commission to regulate the interchange of cars does not constitute a taking of property within the constitutional prohibition against the taking of property without due process of law; or the taking of property for public use without compensation. *C. B. & Q. R. R. Co. v. Illinois,* 200 U. S. 561; *Mugler v. Kansas,* 123 U. S. 623; *N. Y. & N. E. R. Co. v. Bristol,* 151 U. S. 556; *Gibson v. United States,* 166 U. S. 269; *Scranton v. Wheeler,* 179 U. S. 141; and the *Legal Tender cases,* 12 Wall. 550.

The cases cited by appellants do not support the contentions made. Appellants contention is based upon the premise that the order of the Commission constitutes the unlawful taking of property because (a) it requires as between various car users that certain classes may deduct an average of two days free time per loaded freight car interchanged before computing car hire on the per diem basis, (b) this class of carrier is required to report car hire settlements to its connections rather than to the numerous car owners throughout the country, and (c) the order requires that non-subscribers and subscribers to the Per Diem Code be treated alike in respect to reclaim allowances. These characteristics of the regulation

of the Commission do not constitute the taking of property without compensation and without due process of law as contended by appellants. The injury, if any, resulting from the regulation is but an incident to the establishment by the Commission of just and reasonable regulations to govern the complex question of car hire interchange.

Similar contentions were made and rejected by this Court in the *New England Divisions case*, 261 U. S. 184. The argument was there made that the division of the joint rate required by the Commission was essentially a partition of property and that the apportionment made is a taking of property without due process of law. In answer to this the Court said:

> "But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom."

Likewise it may here be said that appellants' contention that the order of the Commission takes their property without just compensation and without due process of law begs the question, the question being what constitutes just compensation as between the

car owner and the car user, and as between the various car users? That question under the law must be determined by the Commission, as it has exclusive jurisdiction over the subject matter. The Commission has determined upon the record, composed of nearly 5,000 pages of testimony, that reasonable compensation as between railroads less than 100 miles in length and which return cars to the carrier from which received and railroads of more than 100 miles in length will result to the owner of the car by allowing the short line to deduct an average of two days free time per loaded freight car interchanged in the settlement of car hire with the connecting line.

In *Michigan C. R. Co. v. Michigan R. R. Commission,* 236 U. S. 615, in dealing with the contention that at common law the carrier was not bound to carry property except on its own line and might not have been required to permit its equipment to be hauled off of its line, the Court said:

> "But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property cannot be deemed to be 'taken' in the constitutional sense. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 63, 48 L. ed. 614, 618, 24 Sup. Ct. Rep. 396; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 470, 58 L. ed. 310, 318, 34 Sup. Ct. Rep. 152; Wisconsin M. & P. R. Co. v. Jacobson and Chicago, M. & St. P. R. Co., v. Iowa, *supra.*"

In the *Michigan case* the Court reaffirmed a principle long recognized that the property of a railroad, such as cars, though acquired through the expenditure of private capital, are nevertheless subject to reasonable regulation because devoted to a public use, and that the requirement of the tribunal acting for the legislative body that cars be freely interchanged between different railroads is not such an exercise of power as to constitute the taking of property as that term is used in the Constitution.

Unless in this case the Commission abused the power conferred upon it by Congress, or unless it exercised that power in an unreasonable or arbitrary manner, its order is valid. It is also clear that the circumstance that its order may in some instances cause some injury to appellants as an incident to the exercise of the power will not constitute the taking of property in contravention of the Fifth Amendment. The order is a legitimate exercise of the power conferred upon the Commission to determine and prescribe reasonable rules and regulations to govern the interchange of cars and reasonable compensation to the car owners under the various conditions under which cars are used by the different classes of railroads. The fallacy of appellants' contention proceeds from their major premise, which is that unless the car owner receives $1 from each and every user for each and every day its car is out of its possession, it will be deprived of reasonable compensation. We submit that reasonable compensation for the use of a car may be something short of a straight per diem charge and at all events that this is a question within the power of the Commission to determine, and once

it determines the question upon evidence, its conclusion is final and not reviewable by the courts.

4. There Is No Merit in Appellants' Contention that the Evidence of Record Before the Commission was Insufficient to Support Paragraphs 2, 3 and 5 of Its Order, and that the Court Below Erred in Failing So to Find.

Appellants contend that the order of the Commission is void because each paragraph thereof creates a classification of railroads and that the classification created by each is different from that created by every other paragraph and that the order of the Commission is not supported by evidence.

Under another chapter we have already pointed out that this Court and other courts have recognized the validity of laws and of regulations which apply differently to different classes of railroads. The record before the Commission consists of 4800 pages of transcript and 540 exhibits. It deals with practically every phase of the relation between railroads in respect to the interchange and compensation for the use of cars. It contains a history of car hire or per diem settlements in effect for the past 40 years. It shows that many years ago interchange arrangements between carriers were based largely on the understanding that car interchange between carriers would be equalized, that is carrier A would return to carrier B as many cars as it received from carrier B and that at that time the question of compensation by the user of the car to the car owner was not emphasized. The first plan of compensation was based on the number of miles the car traveled per day.

Later a per diem charge of 20 cents was established. Since about 1903 the per diem rate has been increased progressively from 20 cents per car day to the present rate of $1 per car day.

The record shows the financial and other conditions of about 141 short lines which are fairly typical of the short line railroads in this country. It shows that the division of revenue received by short lines out of joint rates with trunk lines has not been fixed generally with car hire expense in mind and that if this class of short lines were required to pay the per diem rate of $1 for each and every day a car is in their possession it would add greatly to the expense of operation without contributing anything to increased efficiency in the use of cars. The American Railway Association has insisted on treating non-subscribers to the Per Diem Code on a different basis from subscribers to that code. The Commission has condemned this classification and has substituted therefor a classification based upon circumstances and conditions and the character of service performed by different railroads. This is but the substitution of a rule of reason for an arbitrary rule based on the question whether a railroad was a subscriber or a non-subscriber to the per diem rules agreement.

As to paragraph 3 of the Commission's order which provides that railroads less than 100 miles in length with only one railroad interchange connection may be relieved of reporting car hire settlements with the numerous car owners in the country, the testimony of witness Cass before the Commission showed that the cost of reporting car hire settlements by this class of railroads would amount to about $500,000 per year. This part of the Commission's order is based upon

two important considerations: (a) that trunk line connections of short lines are equipped with large accounting forces to do this work and are now doing the work and have always done it, and (b) that to impose this task of reporting car hire settlements on this class of short lines would add an additional expense to the traffic of the country not justified by the circumstances and which would be contrary to the best interest of the railroads and the public.

The contention by appellants that paragraphs 2, 3 and 5 of the order of the Commission are not supported by evidence is puerile. The appellants, as well as all other respondents in the United States, availed themselves of the opportunity to introduce evidence before the Commission. Hearings were held at various points throughout the United States. These appellants were represented at these hearings by counsel for the American Railway Association, of which they are members. Counsel was given an opportunity to examine and cross-examine witnesses and to object to any evidence that was irrelevant and immaterial and to put in evidence that was material and relevant.

At page 47 of their brief appellants say:

> "We do not contend that the order here under attack was made without a hearing. Numerous hearings were held and a *complete record was made.*"

It is hard to conceive how, in the face of this concession, counsel for appellants can seriously contend that although a complete record was made there is not sufficient evidence in the record to support the order of the Commission. After making this concession on page 47, appellants say:

> "We do contend that paragraphs 2, 3 and 5 of the Commission's order exceed the constitutional limits within which the Commission must function in that they operate to confiscate appellants' property and require its taking without compensation to them and without due process of law; that the evidence before the Commission does not support the conclusions reached in these paragraphs, and that they are arbitrary, unreasonable, not supported by the evidence and amount to an abuse of power."

These are simply formal contentions which this Court will not seriously consider unless they are shown to be based on substance. As the Court knows, contentions of this kind are made in practically every case where an order of the Commission is attacked. If, as appellants concede, the record before the Commission was complete, it is inconsistent for appellants to say at the same time that the evidence in that record is insufficient. By this contention appellants say in effect that the judgment of the Commission was bad and that it gave too much weight to certain evidence and not enough to other evidence. This Court will not substitute its judgment for that of the Commission nor will it weigh the evidence. This Court has said that "a tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others". *O'Keefe v. I. C. C.*, 240 U. S. 294.

The fact that the order of the Commission applies to all common carriers by railroad subject to its jurisdiction and is universal in its application is, of course, not a reason to challenge its validity. As this Court held in the *Assigned Car cases*, section 1

(14) of the Interstate Commerce Act includes the power to prescribe a rule of universal application.

CONCLUSION.

The order of the Commission here under attack is based upon evidence adduced in the most comprehensive investigation ever conducted by the Commission concerning the rules, regulations and practices governing the interchange of freight cars between railroads subject to the Act and the compensation paid by the user to the owner of such cars. The problem is difficult and complex. Numerous complaints had been filed with the Commission by certain classes of railroads alleging that the car hire rules of the American Railway Association applied by trunk lines were unjust and unreasonable as applied to the interchange of cars between trunk lines and short lines. And in general there had been much dissatisfaction concerning the efficacy and reasonableness of these rules and regulations. With this background, in January, 1926, the Commission instituted a nation-wide investigation with the object in view of exercising the power conferred upon it by section 1 (14) of the Interstate Commerce Act which authorizes it to prescribe just and reasonable rules and regulations and to fix compensation.

It is no exaggeration to say that every phase of car hire problems was presented to the Commission by men who had devoted a large part of their lives to the work. As appellants concede, numerous hearings were held at various places throughout the country and a "complete record" was made. There is no merit in appellants' contention that the order of the Commission is not supported by substantial evidence.

The determination of what consitutes a reasonable rate, rule or regulation for the future is a legislative or administrative function. *Great Northern Rwy. Co. v. Merchants Elevator Co.*, 259 U. S. 285. The administrative orders of this character when supported by evidence are conclusive. *Central R. R. Co. v. United States*, 257 U. S. 247, 256. The fact that the universal character of the regulation prescribed by the Commission may cause incidental injury to certain carriers is not a reason for finding the regulation invalid. *Assigned Car cases*, 274 U. S. 564.

As we have already pointed out, appellants concede, as they must, that the Commission has jurisdiction over the subject-matter. They concede that a complete record was made. As between certain classes of car users the Commission determined that the car owner would be reasonably compensated under the per diem method of computing compensation by permitting certain short line railroads to take two days as time out before compensation at the per diem basis should commence. The essence of appellants' position is that in prescribing such a regulation and in determining compensation on this basis the Commission acted in an unreasonable manner. This begs the question because, if the Commission had the power to make the order and if, as we contend, it was supported by evidence, the Court will not review the question whether the judgment of the Commission was wise, expedient or reasonable. The Commission's judgment on that question is final.

As the Commission had authority over the subject matter dealt with by the order under attack and as the order is supported by substantial evidence its

order and the findings of fact and conclusions of law of the court below should be sustained.

Respectfully submitted,

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October 5, 1931.